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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE BARRON,

Defendant and Appellant.

B203792

(Los Angeles County
Super. Ct. No. KA068471)

APPEAL from a judgment of the Superior Court of Los Angeles County.
William R. Pounders, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael C. Keller and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

After his first trial ended in a deadlocked jury, Eugene Barron's (appellant) second jury convicted him of first degree murder (Pen. Code, §187, subd. (a))¹ (count 1); attempted willful, deliberate, premeditated murder (§§ 664, 187, subd. (a)) (count 2); assault with a firearm (§ 245, subd. (a)(2)) (count 3); and shooting at an occupied motor vehicle (§ 246) (count 4). With respect to counts 1 and 2, the jury found true the allegations that appellant personally used and intentionally discharged a handgun, which proximately caused great bodily injury and death to the victims. (§§ 12022.53, subds. (b), (c), (d), and (e)(1).) With respect to count 3, the jury found true the allegation that appellant personally used a firearm. (§ 12022.5.) With respect to all counts, the jury found true the allegation that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(A).)

The trial court sentenced appellant to a total term of 90 years to life. The sentence in count 1 consisted of 25 years to life for the murder and a consecutive term of 25 years to life for the firearm enhancement. In count 2, the court imposed a consecutive term of 15 years to life for the attempted murder and 25 years to life for the firearm enhancement. On counts 3 and 4, the trial court imposed and stayed sentences pursuant to section 654.

Appellant appeals on the grounds that: (1) the trial court's admission of evidence that appellant was presently a narcotics shot caller in jail for the Mexican Mafia organization constituted an abuse of discretion, and (2) the trial court's admission of the Mexican Mafia evidence violated federal due process.

FACTS

On September 18, 2004, at approximately 4:30 a.m., Danny Hernandez (Hernandez), Gerardo Cortes (Cortes), and Pablo Penate (Penate) were riding in Cortes's

¹ All further references to statutes are to the Penal Code unless stated otherwise.

car, which was a former taxi. All three were members of the Lil Hill gang. They were in the City of West Covina in the area of Shadow Oak Park, which is frequented by gang members. Although the park closed at 10:00 p.m., people were known to drink and use drugs there after closing.

Upon leaving the park, Cortes's taxi passed a pickup truck driven by Benjamin Cruz (Cruz) of the Puente 13 gang. The pickup made a U-turn and began to follow the taxi. The occupants of the two vehicles shouted their gang affiliations at each other and threw gang signs. The passenger in the pickup truck, who was later identified as appellant, pulled out a gun and fired at the taxi, shooting Cortes in the face. Hernandez got out of the car and began to run. Hernandez was shot in the leg and suffered a severed artery. Residents in the area heard him calling for help and dialed 911. When Hernandez was found, he had bled to death.

Jessica Cortes (Jessica), Cortes's niece, testified that her uncle was a member of the Lil Hill gang and drove an old yellow taxi. At 4:30 a.m. on September 18, 2004, Cortes knocked on Jessica's door. He was bleeding from the face. Cortes told the family he got shot but did not relate the circumstances. The Cortes family called the police and an ambulance.

Cortes was treated at the hospital for a gunshot wound to the face. One wound was to the front of his left cheek and the other was to the left ear. He suffered fractures to the eye socket and the jaw. Jessica stated that Cortes would just walk away when anyone discussed the possibility of his having to testify about the case. At the time of trial, the Cortes family believed Cortes was in Mexico, but they did not really know. He disappeared in October 2004.

Monica Ortiz (Monica) has friends in the Lil Hill gang, and in 2004 she hung out with them. She knew Hernandez, Cortes, and Penate. She also knew Cruz as Danger from Puente. She often spoke with Danger when he came by her house looking for her cousin Joseph. Before Monica heard that Hernandez had been killed, Danger came to see her with a man whom Danger introduced as Puppet from East Side Dukes. Puppet had a goatee and a mustache. Monica identified appellant in court as Puppet. Danger arrived

driving a blue truck with Puppet as his passenger. Monica had never seen Puppet before that day. Danger and Puppet told Monica they had seen a yellow taxi on fire and had heard gunshots. Monica told Danger she would try and find out who owned the yellow taxi.

Monica spoke with police twice. She identified appellant's picture as Puppet and Cruz's picture as Danger in photographic lineups. The prosecutor played a videotape of one of Monica's interviews with police. In the video, Monica said that both men told her they had been on Shadow Oak Drive, and Danger asked Monica if she heard about the shooting. Monica insisted she was not mistaken about who was there with Danger.

Monica's older sister, Christina, knew Hernandez, Cortes, and Penate, but she knew Penate best. He was called Goblin. On September 18, 2004, the day she read that Hernandez had been killed, she saw a dark blue truck arrive, and she saw Monica run out to the truck and get inside. When Monica returned she said she had been with Danger and his friend, Puppet. Monica said the two were asking her questions about a car on fire on Shadow Oak Drive and about someone from Lil Hill who passed away.

On the following day Christina went to Hernandez's home, and she spoke with Penate. He told her he had been drinking at Shadow Oak Park with Hernandez. As they were leaving the park, a blue truck was pulling in. Gang signs were thrown and the truck made a U-turn and followed them as they rode in the yellow taxi. As the taxi accelerated, the truck did also. The truck pulled up next to them. Penate was in the backseat. Cortes pulled over, thinking the truck might leave, and that is when shots came from the truck. Penate said that Hernandez got out of the car to throw beer bottles at the truck and was shot as he was getting out. He then ran away. Cortes was shot in the face. Penate told her the blue truck was occupied by two Hispanic males. The driver was bald, and the passenger, who was the shooter, had hair and a thick goatee. Both were wearing hats. Christina spoke with a Deputy Boskett about what Penate had told her. Christina told Deputy Boskett that the gangs involved were Puente and East Side Dukes.

Detective Steve Wheelless of the West Covina Police Department was assigned to investigate the shooting. On October 5, 2004, he spoke with Penate. Penate was very

cooperative in this first interview. He described the events that preceded the shooting. Penate said that he and his friends in the yellow taxi passed a charcoal gray pickup truck with an extended cab that made a U-turn and started to follow them. The passenger in the truck started shooting out the window, there was an exchange of gang names, and then more shooting. The shooter had yelled, "Fuck Lil Hill." Cortes drove to a gas station initially to seek help, but then left.

Penate described the occupants of the pickup as Hispanic. The driver was light-skinned, had a shaved head and a mustache, and the passenger was darker with some hair and a very thick goatee and mustache. The driver wore an L.A. Dodger baseball cap.

On October 6, 2004, Deputy Boskett contacted Detective Wheelless with the information he had received from Christina—that the people involved in the shooting were a Puente member named Danger who drove a blue Chevy extended pickup truck, and that East Side Dukes was also involved. Detective Wheelless conducted research and confirmed that Danger, or Cruz, had received a traffic ticket in such a truck and that he had been associated with appellant on a prior police contact. Detective Wheelless drove to Cruz's house and saw Cruz outside. Cruz matched the description of the driver at the shooting, and the truck parked outside Cruz's house was missing the right-side mirror. Mirror glass had been found at the shooting scene.

Detective Wheelless prepared photographic lineups containing pictures of appellant and Cruz. When he showed them to Penate, Penate identified Cruz as the driver. He identified appellant as the passenger and shooter. Detective Wheelless did not tell Penate which pictures to choose. Penate identified the Cruz truck as the one used in the shooting.

Detective Wheelless executed a search warrant at the home of Cruz on October 14, 2004, and he encountered a young man named Adam Chavez (Chavez). Chavez said he and Cruz were friends. Chavez frequented the Cruz home and knew the whole family. Chavez said that Cruz and appellant were friends and hung out together. Chavez told the detective that he had seen Cruz and appellant together at Cruz's house approximately three or four days before appellant was arrested (on an unrelated narcotics case) on

September 21 or 22, 2004. Chavez was known as Shaggy and was a member of East Side Dukes. Chavez said that Cruz was a member of Puente 13 known as Danger. Chavez had known appellant for about a year as a member of East Side Dukes who went by the monikers of Puppet and Junior.

When called as a witness by the prosecution, Chavez denied that he knew appellant personally and said he did not know if appellant was in a gang. He said he himself was no longer a member of East Side Dukes. He denied he was called “Shaggy.” He said he knew only Cruz’s family, but he did not hang out with Cruz and did not know if Cruz was in a gang. He denied repeatedly that he had had a conversation with a police officer on October 14, 2004, when the warrant was served on the Cruz home. When confronted with his prior inconsistent testimony, Chavez stated he did not remember making the statements. He denied anyone had contacted him or talked to him about the fact that he had come to court and testified.

A search warrant was also executed at the appellant’s residence on October 14, 2004. Police recovered a blue baseball cap and a box that bore gang graffiti from East Side Dukes.

Detective Dario Aldecoa was assigned to investigate the Hernandez homicide along with Detective Wheelless. Detective Aldecoa testified that there were three crime scenes: on Shadow Oak Drive where the shooting occurred, at a gas station in Walnut where the victims drove, and on Dora Guzman Street where Cortes drove and called 911. Dora Guzman Street was where Cortes’s brother and niece, Jessica lived. When police arrived there they saw the yellow taxi parked across the street from the Cortes apartment. The driver’s side window in front was down all the way. The rear passenger window on the driver’s side was down more than halfway. Detective Aldecoa stated that the tinted windows on the taxi made it difficult to see from the outside in but did not inhibit the occupants from seeing clearly the outside. The taxi had a bullet hole in the trunk and a bullet strike on the left rear passenger door.

Detective Aldecoa interviewed appellant at the county jail about the instant case on October 15, 2004. Appellant was advised of his rights and agreed to speak with the

detective. Appellant admitted membership in the East Side Dukes and said he used the monikers of Junior and Puppet. Appellant said he no longer “gang-bang[ed].” He said he knew Danger from Puente 13 but had not seen him in about a year. Detective Aldecoa testified that on May 2, 2007, when appellant was in court for a status conference, his appearance was different than it was at trial. At the prior proceeding he was not wearing glasses, and he had a thick mustache and a thick goatee.

Leilani Velasquez (Velasquez) had a son with Cruz and testified that he was a member of Puente known as Danger. She knew appellant as Puppet from East Side Dukes. She knew Shaggy from East Side Dukes also. In September 2004 she was staying at the Cruz family home. She stated that Danger and Puppet knew each other but she could not say if they hung out together or if they were friends. She had seen appellant at Cruz’s house. She acknowledged that Cruz had friends from East Side Dukes. Previously, Velasquez had told Detective Wheelless that Cruz and appellant were friends and appellant was at the Cruz home on many occasions. Velasquez said she had asked Cruz to take appellant home on at least two occasions, and Cruz and appellant left the house together.

Velasquez said in August 2006 that she did not wish to testify at appellant’s trial, and she repeated this in the district attorney’s office in May 2007. Velasquez said in May 2007 that a couple of days earlier she had run into a female relative of appellant’s in the courthouse. The female was named Darlene. Darlene asked what Velasquez was doing there and whether she was going to testify. The two exchanged telephone numbers. Someone subsequently telephoned Velasquez and asked her if she was going to testify, and she acknowledged that she was. Velasquez told Detective Wheelless that she was leery about testifying and did not want to be seen as a rat or to say anything detrimental to appellant. She said she had not been threatened in any way.

Lisa Carrera (Carrera), Hernandez’s girlfriend, testified that Hernandez was not a member of any gang. She knew Penate and his moniker, Goblin. She spoke to Penate on the telephone after the shooting. She asked him what happened, and Penate explained that he and Hernandez were with Cortes in Cortes’s taxi, and Penate was in the backseat.

As they drove along Shadow Oak Drive, they noticed a truck behind them driving erratically. Shots were fired as the truck pulled up on the driver's side of the taxi, and Cortes was shot in the face. The passenger was the shooter. Penate ran one way and Hernandez ran the other way.

Theodore Cruz, Cruz's father, acknowledged that his son was in the Puente gang and had friends from other gangs. He knew Chavez but did not know appellant. The boys who came over would hang out in the garage. He stated that the truck in People's exhibit No. 20 was his truck. He recalled an occasion in mid-September 2004 when Cruz borrowed the truck and the mirror was missing the next day. Cruz told his father that a biker had knocked off the mirror. Cruz had asked him for the truck to take a friend home.

Shawn Burkel, a service manager for a Chevrolet dealer, testified that the mirror could not be knocked off the truck owned by Cruz without destroying the bracket and cover. He identified an exhibit of mirror glass as a GM Chevrolet right side-view mirror. Detective Wheelless identified the pieces of glass in People's exhibit No. 27 as the pieces recovered from the shooting scene. The detective also recovered 2 nine-millimeter expended casings, a bullet fragment, a copper bullet jacket, and the bottom of a beer bottle. ~(RT 1318)~

Deputy Steven Skahill testified as a gang expert at appellant's trial. He stated that the most prominent gangs in the area around the City of Industry are the Puente Gang, the Bassett gang, Lil Hill, Townsmen, East Side Dukes, Happy Homes Puente, and Barrio Trece. He identified appellant in court as a member of East Side Dukes who was known as Puppet. East Side Dukes, Lil Hill, and Puente 13 engage in the same types of criminal activities. In 2004, Puente and East Side Dukes were enemies of Lil Hill, and Puente and East Side Dukes were not fighting each other. Deputy Skahill, when given a hypothetical based on the facts of the incident in this case, said the throwing of gang signs would be a challenge because of both gangs' desire for bragging rights and respect. The entire gang would benefit from one individual's violent response.

Deputy Skahill said it was possible for a member of Puente 13 to be friends with a member of East Side Dukes, and there is no age limit to being an active gang member.

Deputy Skahill identified a board, which was found in Cruz's garage. It contained graffiti from both East Side Dukes and Puente.

Deputy Skahill discussed the meaning of tattoos shown on photographs of appellant and Cruz. One of appellant's tattoos read "Tinys," and Deputy Skahill said this was a clique of the East Side Dukes. Deputy Skahill stated it was possible for an East Side Dukes member and a Puente member who hang out together to answer a challenge together against the Lil Hill gang. They would be acting against a common enemy. Each of their respective gangs would benefit. When given a hypothetical based on the facts of the case, Deputy Skahill was of the opinion that the shooting was committed for the benefit of a criminal street gang.

Deputy Skahill stated there were rules against a gang member testifying against another gang member, even in an opposing gang. In addition to not testifying from fear or retaliation, a gang member who refuses to testify gains respect. Gang members in custody are especially vulnerable to retaliation.

Before appellant's first trial, Penate happened to be in custody for an unrelated offense. Deputy Patricia Bojorquez testified that she was transporting appellant from lockup to a courtroom in February 2005 when they passed Penate, who was standing against a wall. As they passed, appellant pulled away from the deputy to lean down and forward. Bojorquez feared appellant was going to hit Penate with his head. Bojorquez held appellant's chain while appellant looked closely at Penate. Appellant was nodding his head and saying "Yeah." Penate looked terrified and cowered. He began yelling, "I'm not going to say nothing, I ain't saying nothing." At that point, other deputies "jumped in" and pulled appellant back.

After Penate's encounter with appellant, Detective Aldecoa spoke with Penate at a juvenile camp on March 23, 2005. When the detective asked Penate about the incident, Penate acknowledged that it had occurred but he downplayed it and said it was no big deal. Penate acknowledged that the encounter was with the person he had identified in the six pack he had been shown. When shown a photo of appellant Penate confirmed that the incident at the Citrus lockup had been with appellant. Appellant had told Penate that

he was locked up with Penate's homeboy, Listo. Penate said he did not feel threatened by the incident, but he also said he did not want to have to testify in the case because he felt that appellant was "cliqued up" with the Mexican Mafia. Penate did not want himself or his family to suffer retaliation for his testimony. Penate's mother also told him not to testify.

At appellant's trial, Penate testified that Lil Hill was a rival gang of Eastside Dukes and Puente 13. He denied knowing Cortes and said he knew Hernandez "just from the neighborhood." He later said Hernandez was a good friend and a homie. When shown that on April 13, 2005, he had said under oath that he knew Cortes, he said he did not remember. Penate eventually acknowledged Cortes was his good friend and was driving the taxicab that night, but he denied he was with Cortes and Hernandez at Shadow Oak Park and denied having been in the yellow taxi. He later admitted he was in the backseat but said he did not know where he was or what he was doing. He claimed not to recognize Cortes's photo in People's exhibit No. 7, but then acknowledged it looked like him.

Penate stated that the only thing he remembered about September 18, 2004, was that his homie got killed. He said he remembered telling Detective Wheelless on October 5, 2004, that he, Hernandez, and Cortes went out together on September 17. He alternatively denied or did not remember other statements he made to Detective Wheelless during the interview, but occasionally admitted saying something that contradicted his trial stance. He denied describing the truck's occupants and said he was just pointing at guys' pictures, and the police finally told him which one to select.

Penate said he told the detectives that the two suspects were Hispanic and then stated he did not even see anybody. He finally admitted describing the passengers' clothing. He denied knowing Carrera, the mother of Hernandez's child, and then admitted knowing her. He admitted saying that Hernandez tried to run away from the car and only he and Cortes "got out of there." He denied being called Goblin and then admitted he was called that in 2004.

Penate admitted knowing Monica and Christina Ortiz. He denied telling Carrera and Christina what happened to Hernandez. He said he “kept it to [him]self.” He acknowledged that the second time he was shown photographs he selected two—one was the driver of the pickup and one was the passenger. He then denied identifying the truck in a photograph and stated that, despite his signature and comments on the photographs, he had never seen the men depicted. He then said he never lied to the detectives.

Penate denied that there was an incident at the lockup in February 2005. Nothing occurred with appellant, whom he did not recognize in court. He denied telling Detective Aldecoa that he feared retaliation. Penate also said he had told the truth at all proceedings. When presented with prior inconsistent testimony he stated he did not recall, or he denied the prior statement. The prosecutor played a recording of Penate’s conversation with Detectives Aldecoa and Wheelless that had occurred a week prior to trial on May 17, 2007. Penate said he was going to lie “like last time.” He said that it was against the rules for a gang member to testify against another gang member and that was why he did not testify correctly the last time.

During cross-examination, Penate said that he just did what he was told by the detectives with respect to identifying photographs during the interviews. After he was finished they said “good job” and let him go. On redirect examination, he said that he was upset that Hernandez was murdered and at the time he wanted the police to know how it happened. He said the police did not point out anyone for him to initial in the six packs 8 and 9. They did not tell him what to write.

During cross-examination of Penate, defense counsel informed the court that she needed a break because she could not see. After the recess, counsel said that her contact lenses were then okay, but appellant was breaking out in hives and could not breathe because he had eaten a peanut butter sandwich. He ate it because he was starving, and his special diet and medication were taken away. Appellant spoke to the court and said he wished to see a doctor. He insisted that he would be in time to see the doctor at the jail and that he knew the deputies would take him in a “cop car” right away. Appellant expressed his appreciation to the court. When the prosecutor suggested they ascertain

whether appellant would be in time to see the doctor before adjourning, defense counsel stated that appellant could “die before our eyes.” Defense counsel requested the court not inform the jury of any medical problems so that it did not hold the early adjournment against the defense, and the court agreed. On the following day, the court stated that it believed the maneuver of eating the peanut butter sandwich was done so that appellant could get his special diet back.

The prosecutor subsequently called Deputy Christopher Oakley, who worked for the Operation Safe Jails (OSJ) unit at Pitchess Detention Center. The unit gathers intelligence on gang activities at the facility. Deputy Oakley stated that the high profile influential gang members are housed in the gang module, and there is every sort of gang activity in the county jail. Phones are used to facilitate gang activity. Phone calls are monitored, and a warning is repeated every three minutes during the call that the call may be monitored or recorded. Deputy Oakley had monitored appellant’s calls, unaware of the instant case. Through sheriff’s channels, Deputy Oakley contacted Detective Aldecoa because he believed he heard appellant discussing witness intimidation during a call on May 20, 2007. He later contacted the detective about a subsequent phone call. The recorded calls were put on a CD and given to Detective Aldecoa. The calls mentioned narcotic activity and activities of other gang members in custody.

When the recordings of the telephone calls were played for the jury, the prosecution called Detective Christopher Brandon, who works with the prison gang unit of the Sheriff’s Department Major Crimes Bureau. Detective Brandon said he had heard of appellant, knew his moniker, and knew where appellant was housed in Twin Towers. He believed appellant was housed in a gang module. Detective Brandon became aware of some telephone calls that had been recorded by OSJ deputies in connection with this case. The prosecutor played a CD of the phone calls for the jury. Detective Brandon testified that, based on his training and prior experience, the conversation sounded “very similar about doing business.” He identified terms and names used in the conversation that signaled that appellant and a female were discussing Mexican Mafia issues. Detective Brandon’s testimony is summarized *post*.

Detective Aldecoa testified that the voice on the telephone was that of appellant. He stated that appellant, during one of the conversations, said he went “man down” in order to get back to jail earlier to make telephone calls. Appellant was referring to the day court recessed early because of appellant’s reported medical problem.

Defense Evidence

Sally Morales, appellant’s wife, testified that in September 2004 she, appellant, and their two children were living in the home of a friend. When things became hectic at the house, they would go to a Motel 6 for a couple of days—either the one in Rowland Heights or the one in Hacienda Heights. On the day of the shooting they were at the motel in Hacienda Heights. She heard about the shooting a few days later, although she acknowledged previously testifying that it was the day after. She did not tell anyone that appellant was with her until the following February when the defense investigator spoke with her because no one called her or asked her about it. Morales acknowledged specifying previously that they stayed in the Hacienda Heights motel to the defense investigator, but at trial she was unsure. She did not check the records of the motel to verify that she and appellant were there on the night of the shooting. At the Rowland Heights motel, an employee named Tracy would sometimes give her rooms at half price and Morales would not register.

Morales said she knew who Cruz was but did not know him personally and had never seen him with appellant. She denied saying at a prior proceeding that she had never seen Cruz before. When faced with her prior testimony, she said she did not admit knowing Cruz because he is “a little scary.” She stated that appellant knew Shaggy. She did not think that appellant knew Cruz. Morales said that appellant was a member of East Side Dukes and had the moniker “Puppet” “when he was younger.” She believed appellant was 34 years old.

Steven Strong was a defense investigator and also a certified gang expert. He testified that appellant was at one time a member of the East Side Dukes clique called Tynys. Morales told Strong that she knew Cruz because he was someone who lived close to her at one time and that she saw him often.

When posed a hypothetical question based on the facts of this case, Strong said that it did not make sense for a Puente 13 member and an East Side Dukes member to be in one car shooting at Lil Hill. Two members of different gangs do not commit crimes together. It might indicate one of the two gangs is weak. He acknowledged that relatives or friends who belong to different gangs sometimes hang out together.

Strong did not believe appellant was an active member of East Side Dukes based on all the reports he had been given in the case and on his conversations with appellant and other people. Strong stated that not only the Mexican Mafia, but also the Aryan Brotherhood and other gang members have a hand in drug activity in the county jail. Strong said that sometimes non-active gang members are used as shot callers by the Mexican Mafia. He acknowledged that it was obvious from the phone calls that appellant was inquiring about inmates in authority in other jail facilities and that he was referring to narcotics traffic.

Rebuttal Evidence

Binny Taylor (Taylor), the general manager of the Motel 6 in Hacienda Heights, was acquainted with Morales because she had been a frequent customer at the motel. Taylor did not know appellant. Taylor went through the motel's computer data base and checked if Morales had been a guest in September 2004. Morales stayed at the motel on the night of September 1, 2004, and on the night of September 14, 2004, but there was no record of her staying there on the night of September 18, 2004. There was no record of appellant's name.

Taylor also checked the records of the Motel 6 in Rowland Heights. There were no records of Morales having stayed there in September 2004. Appellant stayed there only on the night of September 21, 2004. Taylor explained that electronic keys are issued at the motels, and they must be scanned to enter the rooms. Anyone who made a key to a room that was not officially rented would be caught. An employee must input a password to make a key. Taylor never had an understanding with Morales that Morales could rent a room without going through the check-in process.

DISCUSSION

I. Appellant's Argument

Appellant contends that the potential for undue prejudice greatly outweighed the attenuated relevance of the Mexican Mafia evidence, and the trial court's admission of this evidence over appellant's objection was an abuse of discretion. The probative value of the evidence on the sole issue in this case, i.e., identity, was attenuated because the evidence pertained to only second-tier issues, and it was also weak and cumulative. In contrast, the prejudice of admitting evidence that appellant was actively working for the Mexican Mafia during trial was highly prejudicial. Appellant maintains there is a reasonable chance the erroneous admission of the evidence determined the outcome of this case given the nature of the other evidence and the fact that the prosecutor emphasized the evidence during closing argument.

In a separate and related claim, appellant argues that the admission of the evidence was so serious an error due to its extremely inflammatory nature that it violated his federal constitutional right to due process by rendering his trial fundamentally unfair. Alternatively, the trial court so egregiously abused its discretion in misapplying the state rules of evidence that there was an arbitrary denial of a state-created right, which was a violation of appellant's Fourteenth Amendment right to due process. Appellant states that, "[g]iven the absence of other overwhelming evidence of appellant's guilt, this Honorable Court cannot say that these jurors did not employ the Mexican Mafia evidence in reaching their verdict" and should reverse the judgment.

II. Relevant Authority

Evidence of gang membership and activity is admissible if relevant to establish the defendant's motive, identity or some fact other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*)). "Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent

to guilt of the charged crime. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Although the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory effect (*Williams, supra*, at p. 193), the evidence should be excluded only when it is “tangentially relevant” to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660.)

Evidence Code section 352 provides: “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” This section applies to prevent *undue* prejudice by the admission of ““evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues”” not the prejudice “that naturally flows from relevant, highly probative evidence.”” (*People v. Padilla* (1995) 11 Cal.4th 891, 925, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823.)

The determination as to whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) It is appellant’s burden on appeal to show an abuse of discretion and prejudice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

III. Procedural History

Trial began on May 21, 2007. On May 24, 2007, the prosecutor informed the trial court that he had just received an audio CD and a report regarding some telephone conversations of appellant’s that had been recorded during the previous week. The prosecutor indicated his intention to ask the court to admit the conversations, which related to the testimony of witnesses and to gang activity. The prosecutor had provided the information to defense counsel. Defense counsel stated she had not listened to the entire tape, but the only problem she saw was the mention of the prior hung jury, which would probably have to be redacted. She stated, “I know everything else can come in.”

The prosecution filed a written motion to admit two of appellant's jail telephone calls into evidence on May 30, 2007. The prosecutor stated that the calls discussed mainly gang activity in the jails. Defense counsel stated she had listened to the recordings and stated, "This whole Mexican Mafia thing, your honor, I think we're going to go down a whole different road here. I'll have to have Mr. Strong [defense gang expert] refute what they're alleging about the Mexican Mafia and have him listen to the tape."

After the trial court had listened to both of appellant's telephone conversations, it stated that, apart from mention of the hung jury, there was nothing so prejudicial or irrelevant in the conversations so as to require redaction. Defense counsel stated that her only objection to the calls was to the references to the Mexican Mafia and the prosecutor's probable calling of an expert to talk about the group, which was a "huge stretch" for defense counsel. She stated it was highly prejudicial and inflammatory and a collateral issue. The trial court noted that appellant indicated in the conversation that he is running the gang in jail, and the calls were therefore relevant to the gang allegation. They were also relevant as a response to the defense attempt to show that appellant was too old to be still in a gang and that he was in "Tinys," an inactive subgroup of the gang. The trial court noted that the conversations occurred during jury selection of the instant case. The trial court stated that it would allow the recordings to be played.

On the following day, defense counsel told the trial court that she wanted to put something "on the back burner." She proposed calling the prosecution gang expert and the defense gang expert to "see what's really going on." She pointed out conflicting implications in the recordings and stated it "might just be a wash" and it "might just be confusing the jury." She stated that unless the prosecution's gang expert talked to her client to find out the exact meaning of certain things, the evidence "might be fraught with problems." The court stated it was not going to resolve the issue about what certain things meant on the recording. There was enough to show that appellant was in control, that someone owed him money, and that he was going to assign someone the task of watching that person and making sure they paid. This supported "the assertion of the

prosecution that appellant was and is involved in organized matters that we call a street gang.” When defense counsel stated that appellant was making references only to a sports betting pool, the court stated that the meaning of appellant’s remarks on the telephone was not an issue for the court to decide. There was enough to support the prosecution’s theory. The recorded conversations were played for the jury at trial. As recounted *post*, Detective Christopher Brandon testified regarding the Mexican Mafia.

After the verdicts were rendered, the trial court granted appellant’s motion to relieve his trial attorney and substitute new counsel. Defense counsel subsequently filed a motion for new trial based on several issues. Among them was the argument that the admission of the telephone conversations was error. Counsel argued that appellant’s being in a gang in 2007 did not necessarily mean he was in one in 2004, and prior counsel was ineffective for not arguing that there was no relevance. Counsel also argued that trial counsel had been ineffective in failing to seek a continuance or mistrial because the prosecutor had not immediately provided transcripts. Trial counsel also should have procured a Mexican Mafia expert and requested an Evidence Code section 402 hearing on Detective Brandon’s testimony. In denying the motion with respect to the recordings, the trial court stated that the jail calls were relevant to show that appellant was a shot caller, or a higher-up in the jail mafia. This also had relevance to the threat to Penate. The court stated that it believed counsel was making more of the tape recording than it was worth. Although persuasive, it was not “some kind of dynamite that destroyed the defense.” The court did not deny the recording’s significance, stating “that makes it relevant.” The trial court denied the motion for new trial.

IV. Detective Brandon’s Testimony

Detective Christopher Brandon of the prison gangs unit testified that his area of expertise was the Mexican Mafia. He defined the Mexican Mafia as a prison gang of approximately 800 members put together by members of Hispanic gangs who wanted a means to control all the Sureno (southern) gangs within the custody facility and on the street. Its purpose is to facilitate criminal activity, specifically selling narcotics. The Mexican Mafia wants to make money, and it does that by controlling the more influential

members within the gangs who in turn have influence over lesser members. They control the others by fear and intimidation, specifically murder. The Mexican Mafia is considered to be organized crime. A Hispanic gangster knows that going to jail is part of the criminal life, and in order for him not be a victim he becomes part of this prison gang. Someone who is said to be “cliqued up” with the Mexican Mafia has influence with members of the organization and is probably working for the organization. This means running narcotics, extortion, witness intimidation, and anything that promotes financial gain.

Detective Brandon said that an active gang member who enters jail claims his gang and then becomes a South Sider if he is an active gang member. Not everyone who enters the jail system can claim to be a member of the Mexican Mafia. A shot caller is an individual who gives orders that facilitate selling dope and making money, and he reports to someone higher than himself. A shot caller would normally run a row or a module in jail. The main shot caller passes information to his conduit, who in turn passes it on to other members. The Mexican Mafia members and associates use the phones to contact persons on the outside as conduits of information. If one were not associated with the Mexican Mafia it was unlikely one could freely move narcotics in and out of the jail. If caught, the person might be taxed, or risk assault or murder. Detective Brandon described the various ways narcotics are smuggled into jails.

Detective Brandon had heard of appellant before being contacted for this case. His moniker was Puppet and he was housed in Twin Towers in a gang module. Detective Brandon believed the female heard in one of appellant’s telephone conversation was passing on information. The detective explained appellant’s orders to put something on his tio’s books as meaning that appellant was working for the person in control of the facility and had to make sure that the person in control got his money. He tells the female to tell his “tio” that it was a “TD,” meaning a successful score.

At another point, Detective Brandon believed appellant was instructing someone to intimidate a witness. Appellant appeared to be directing the female to tell a witness

what to say. The female also appeared to be giving appellant information about which inmates were in charge of activities in other custodial facilities.

Detective Brandon believed appellant to be a shot caller based on his actions as described in the calls. There was a male caller who asked appellant if he should “reach out and touch” Velasquez. There was also a reference to the moniker of the Mexican Mafia authority figure in the county jails.

In response to a hypothetical based on appellant’s encounter with Penate while in custody, Detective Brandon stated that the person who said he was locked up with the other’s homeboy was communicating to the other that he has information about where the person lives, who his family members are, and where he could be found.

On cross-examination Detective Brandon acknowledged that he did not know appellant specifically to be a Mexican Mafia member. According to Detective Brandon, a person who is not an active gang member would not be given the authority within the Mexican Mafia structure to either be a shot caller or to facilitate mafia business within the jail. There must be loyalty shown and a background of being a successful criminal gangster.

It is common for Mexican Mafia members to use fear with witnesses in court. According to Detective Brandon, “If they catch you testifying, they’ll kill you.” They also threaten family members. To avoid testifying, a person would not answer questions, fail to appear, or not tell the truth.

V. Evidence Properly Admitted

Although respondent argues that appellant failed to timely object to the Mexican Mafia evidence on some of the grounds he now sets out, the various arguments raised by defense counsel encompassed most of the issues he raises on appeal. We therefore address appellant’s claims on the merits. We conclude that the evidence about the Mexican Mafia was relevant, that its probative value exceeded its prejudicial effect under the circumstances of this case, and that appellant was not denied a fair trial.

The instant case is very unlike *People v. Albarran* (2007) 149 Cal.App.4th 214, cited by appellant. In *Albarran*, a plethora of generalized testimony on gang activity,

including testimony that a tattoo of the defendant's referenced the Mexican Mafia, was admitted. Yet there was nothing inherent in the facts of the crime to suggest a gang motive, apart from the fact that the defendant was a gang member. There was no throwing of gang signs or shouting of gang names when the shooters fired at an occupied house. (*Id.* at p. 227.) They merely fired their guns and ran away. (*Id.* at pp. 217-218.) Nevertheless the court allowed the expert witness to testify about threats the defendant's gang had made to police and references to the Mexican Mafia, despite the fact that this evidence was irrelevant to the underlying charges and was prejudicial. (*Id.* at pp. 227-228.) The court in *Albarran* held that the effect of the gang evidence prevented defendant from having a fair trial. (*Id.* at pp. 230-231.)

In this case, appellant's defense was mistaken identity. To support this theory, he sought to show that he was not a current and active member of the East Side Dukes criminal street gang and that he did not know Cruz, who drove the truck on the night of the shooting. Appellant called witnesses who claimed appellant and the driver of the truck, Cruz, did not know each other or could not have acted in concert. For example, he called Morales to say she did not know Cruz, appellant did not know Cruz, and appellant was no longer an active gang member. The Mexican Mafia evidence showed that appellant also supported his theory by influencing some of the prosecution witnesses, such as Chavez and Velasquez, and Detective Brandon's testimony explained how he was able to do so. The Mexican Mafia evidence was thus relevant and probative on the issue of whether Chavez's denial of everything he said to police and his claim he did not know appellant were credible.² It was also probative on the issue of whether Velasquez

² With respect to Chavez's prospective appearance in court, appellant states to someone named Robert: "Aye, aye and fucking Shaggy's there too, Ese. . . . Fucking every time, Ese! . . . They're fucking, they keep bringing him, because he made a statement when he got busted at his house, and and they're, so in order to use it they got to put him on the stand, you know what I'm saying? . . . He goes, I don't know what the fuck he always goes! Last time they had to bring him, arrest him and bring him, but this time he went, he came walked straight in." Robert replies "When I, see him homes, I'm

was telling the truth about her knowledge of Cruz's relationship with appellant.³ Given the erratic testimony of Penate, the only eyewitness, the prosecutor had every right to present the evidence that came into his hands while the trial was ongoing -- evidence that showed appellant's attempts to manipulate witnesses and deceive the jury and the court. "Whether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience that a court could reasonably believe expert opinion would assist the jury." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 945 (*Gonzalez*).) The court reasonably allowed the prosecution to tie in the statements of appellant and his interlocutors on the telephone to the apparently successful efforts by appellant to influence the identification testimony in his case as well as deny his current gang membership. Thus, the testimony of Detective Brandon was

gonna fucking talk to him again. But I talked to him about that, that was a while back"He later asks, "Uh, well, you know, I don't know homes, you want, you want him to be absent or what?" Appellant replies "Yeah."

³ Appellant told Robert: "You know who they added on there? . . . They added Leilani on there." Robert asks if she is a character witness for appellant or a witness for the prosecution. When appellant explains that she is for the prosecution, Robert asks, "Oh so, more or less, um, you want me to reach out and touch that broad, or what?" Appellant replies: "Yeah, yeah." "You know what I mean?" He adds "Cause um, I mean if she's, if she's going to go and she could say something good it would be even better, you know what I'm saying?" Robert replies, "Yeah, it's gonna, that'll incriminate the shit out of their case, homes if they're thinking, yeah well, this haina's there for the prosecution and she ends up (inaudible)." Later, when speaking with a female caller who tells appellant that Velasquez is going to say that appellant and Danger used to "kick it," appellant asks, "So why, nobody went to get a hold of her?" Later in the conversation he says to the female, "What I need you to do . . . you've got to call Huerito, right? . . . And tell him that I need that done ASAP with what's her name. . . . Like, I don't need her going at all then, you know what I mean?" And later, "So make sure you call my homeboy right now. Make sure about her, all right? . . . Don't . . . she doesn't, fuck that. She never went last time, you know what I mean?" "Or someone, someone um. She pleads the Fifth, that's it, you know what I mean? . . . And that's all she has to say, you know what I mean?" . . . "Make sure that gets done, I don't need that, all right?" . . . "Yeah and um, if you have to, you guys go over there, you know what I mean?" . . . "The Fifth, don't know nothing, you know what I'm saying? . . . Yeah, she only knows me through, because of . . . from a kid when she grew up, that's it, you know what I mean?"

relevant and highly probative on two aspects of the evidence that affected the main issue of identity. The issues to which the Mexican Mafia evidence was relevant were not tangential, as appellant claims.

The Mexican Mafia evidence was also clearly relevant and probative to explain the extreme fear suffered by Penate, as shown by his sometimes irrational and self-contradictory testimony. Penate himself had indicated to police that the fear of retaliation and the fact that appellant was “cliqued up” with the Mexican Mafia were the reasons for his reluctance to testify. As in *Gonzalez*, in the instant case, the Mexican Mafia evidence “was relevant to help the jury decide which version of the testimony was truthful: the eyewitnesses’ initial identifications of defendant as the shooter . . . or the later repudiations of those identifications” (*Gonzalez, supra*, 38 Cal.4th at p. 946.) “An explanation of the basis for the witness’s fear is likewise relevant to [his] credibility and is well within the discretion of the trial court. [Citations.]” (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) We note that it was reasonable to infer that Cortes’s absence and possible flight to Mexico were also a result of fear of retaliation.

Furthermore, contrary to appellant’s argument, appellant’s 2007 gang participation was probative of his 2004 gang participation, and it was Detective Brandon’s testimony that provided the probative link. As the detective stated, no one in the jail system would be given the kind of business to conduct that appellant was given unless they were an established gang member upon entering the jail. Their jail role would be determined by their past loyalty and success as a criminal gangster. Detective Brandon’s testimony about the Mexican Mafia’s southern domain also provided an explanation for the “Sur” tattoo appellant wears.

In addition, the telephone conversations contained several remarks concerning witnesses in the trial and actions requested by appellant that were abstruse, as if in code. Detective Brandon’s testimony served to put the remarks in context. His testimony also, in conjunction with the evidence of the telephone calls, helped to explain why witnesses could be fearful of appellant even though he was incarcerated. ““The law does not disfavor the admission of expert testimony that makes comprehensible and logical that

which is otherwise inexplicable and incredible.”’ (*Gonzalez, supra*, 38 Cal.4th at p. 947.) It is true that Detective Brandon’s opinion on the reach of the Mexican Mafia and on appellant’s activities (which suggested his membership in the organization), if found credible by the jury, might lead the jury to credit Penate’s and Chavez’s initial statements when considered with other evidence in the case. As stated in *Gonzalez*, however, “this circumstance, makes the testimony probative, not inadmissible.” (*Ibid.*)

With respect to prejudice we believe the evidence was not so unduly prejudicial as to violate the state law standard. It is not reasonably probable that a result more favorable to appellant would have resulted absent the evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.) Nor did the evidence violate due process and render appellant’s trial fundamentally unfair. “To prove a deprivation of federal due process rights, [appellant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.” [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ [Citation.]” (*Albarran, supra*, 149 Cal.App.4th at p. 229; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

We believe the Mexican Mafia evidence was, as the trial court stated, “not some kind of dynamite that destroyed the defense.” Significant gang evidence related to the Puente 13 and East Side Dukes gangs was properly admitted. Therefore, no emotional bias can be attributed to the Mexican Mafia evidence. In light of the fact that Detective Brandon did not testify that appellant was actually a Mexican Mafia member, the additional effect of evidence relating to the Mexican Mafia was not unduly prejudicial. When considered in context with all of the other evidence, Detective Brandon’s explanation of the operations and attitude of the Mexican Mafia in the context of decoding appellant’s telephone conversations did not result in a trial that was fundamentally unfair. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

We disagree with appellant that the Mexican Mafia evidence was cumulative, however, since appellant made every effort to portray his East Side Dukes gang membership as something he left behind in his youth. Appellant called witnesses to say he was no longer in a gang, and he influenced Chavez to say he did not know if appellant was in a gang. Furthermore, appellant's activities in jail, which Detective Brandon associated with the Mexican Mafia, were no more inflammatory than the instant crime, where appellant was accused of shooting unarmed strangers based on the simple fact that they were in rival gangs. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial. . . .' In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

We disagree with appellant's argument that the prosecutor used closing argument to scare and inflame jurors about appellant's character and invite them to irrationally infer identity. Notably, the prosecutor did not mention the telephone calls or the Mexican Mafia except in rebuttal. Defense counsel argued that her client was not with the Blue Devils clique of East Side Dukes, stating, "Yes, he has tattoos, yes, he was trying to cover it up. Yes, he did leave the gang life as an active member." She also stated, "Let's talk about the phone calls. Okay. They're phone calls. I think it's a smoke screen, I think it's a red herring. I think the D.A. has thrown it at you. I don't think it's relevant, I don't think it's connected to this case whatsoever. They're phone calls." She went on to say that the jury heard about narcotics transactions, "so go charge him with narcotics transactions in the jail, not murder." She mentioned her expert's testimony that even non-active gang members "can do this kind of stuff." She portrayed appellant's discussion of his efforts to alter his appearance as merely a desire to look cleaned up for court. She stated that "as far as intimidation of witnesses, everybody came in," including Velasquez. She repeated that the calls were irrelevant and intended to prejudice the jury against her client.

The prosecutor's argument was fair rebuttal to the defense's effort to diminish the importance of the phone calls. He commented on some of appellant's phrases and argued

that, as Detective Brandon said, one cannot do the transactions indicated on the recordings without being “cliqued up” with the Mexican Mafia. The prosecutor argued that the calls were evidence that appellant was an active gang member. Referring directly to the defense argument, the prosecutor stated that the evidence was not a red herring. The prosecutor said that the telephone calls were tangible evidence that appellant was conducting gang business in jail. A prosecutor has “wide latitude to discuss and draw inferences from the evidence at trial,” and it is for the jury to decide whether the inferences the prosecutor draws are reasonable. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) The prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be shown therefrom. (See *People v. Welch* (1999) 20 Cal.4th 701, 752-753.) The jury was instructed that statements of attorneys were not evidence, and that it must decide the facts based upon the evidence adduced at trial, and from no other source. (CALJIC Nos. 1.00, 1.02.) We conclude the prosecutor was merely responding to the defense argument, and the language employed by the prosecutor was not particularly inflammatory.

Furthermore, the evidence against appellant was strong. Despite Penate’s in-court denials, the record shows that he gave the same original version of the events to the detectives, to Christina, and to Carrera. Appellant’s only alibi -- the testimony of Sally Morales -- was weak. Morales’s failure to inform anyone of appellant’s alibi until she was asked rendered the alibi less than credible. She also showed a tendency to improvise when it came to explaining at what time she heard about the shooting and at which motel she and Barron purportedly stayed on September 18th. Morales’s testimony was also effectively rebutted by the motel manager.

The evidence showing appellant’s connection to Cruz was also strong, as shown by Monica, Christine, and the witnesses who later recanted prior statements -- Chavez and Morales. The record also showed that on October 13, 2003, almost a year before the shooting, appellant and Cruz were arrested for a traffic stop together with two female passengers in the car. Appellant’s identification card was found in Cruz’s shoe during that stop. Appellant had identified himself giving a false name and was arrested for that

offense at the stop. Also the testimony of Monica and Christina confirmed that appellant and Cruz went fishing for information together on the day following the shooting, and the two men admitted having been near Shadow Oak Park when gunshots were fired. They rode in the same truck that was identified as the truck the shooter was in, according to Penate's original description and the evidence of the broken mirror glass found at the scene.

Moreover, telling evidence of appellant's consciousness of guilt is found in his discussing his purposeful change of appearance,⁴ ordering his interlocutors to prevent someone from testifying, and relaying what witnesses should say. The jury also heard appellant discussing his tactic of deceiving the court and the jury by going "man down," i.e., making himself ill with the stated purpose of leaving the jury with Penate's testimony as the last thing it heard and getting back to jail early to make phone calls to his minions.⁵

Finally, the jury was instructed that all of the gang evidence "may not be considered by you to prove that . . . defendant is a person of bad character or that he has a

⁴ Appellant stated to Robert on the telephone: "I'm, I look handsome as fuck out there though, you know what I'm saying? . . . I got my hair long, going back firme, going back tapered all the way up to the like, to the sides. . . . And then I got, I cut off my, my um, goatee, I just got me like a mustache. . . . So I go out with that and I have some firme ass glasses, I wear some glasses. I wear my firme glasses, and um, I go out there with uh with uh a firme tie. I look like, I look like a straight banker when I'm out there, you know what I mean?"

⁵ When appellant's female caller asks him if he can telephone when in court, appellant replies, "No, there's no phones there. I come back, see I had to go man down today so I can come home, so I can use the phone and I can get some sleep, you know what I mean?" . . . Everything was going good, too, but I said, you know I was thinking about it, it was a good time to go home, for the jury to sit and think about that dude's testimony, you know what I mean? . . . Cuz' the fact that he said, 'I'm not going to point him out,' and 'he's not that guy that did it, I'm not going to send the wrong guy to prison,' you know what I mean?" . . . That was good he said all that, you know what I mean?

disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or to assist in any criminal conduct by gang members.” (CALCRIM No. 17.24.3) “[T]he general rule is that on appeal we must assume the jury followed the court’s instructions and admonitions.” (*People v. Frank* (1990) 51 Cal.3d 718, 728.)

Thus, even if we were to assume error for the sake of argument, appellant has not demonstrated prejudice under any standard. There was no reasonable probability appellant would have received a more favorable result without the Mexican Mafia evidence, and the evidence was not of such a quality that it necessarily deprived him of a fair trial. (*Albarran, supra*, 149 Cal.App.4th at p. 231.) We are convinced the jurors found appellant guilty because of the overwhelming evidence of his guilt. Appellant’s arguments are without merit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ